United Nations CAT/C/61/D/720/2015

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.: General
20 September 2017

Original: English

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 720/2015*, **

Communication submitted by	S.S. (represented by counsel, John Sweeney)
Alleged victim	The complainant
State party	Australia
Date of complaint	4 December 2015 (initial submission)
Date of adoption of decision	9 August 2017
Subject matter	Deportation to Sri Lanka; risk of torture
Substantive issue	Non-refoulement
Procedural issue	Admissibility — manifestly ill-founded
Articles of the Convention	3 and 22

1.1 The complainant is S.S., a Sri Lankan national, born in 1984, subject to deportation to Sri Lanka, following the rejection of his application for refugee status in Australia. He claims that his forcible removal would constitute a violation by Australia of his rights under article 3 of the Convention. The State party made the declaration under article 22 of the Convention on 28 January 1993. The complainant is represented by counsel, John Sweeney.

1.2 On 16 December 2015, pursuant to rule 114 of its rules of procedure, the Committee acting through its Rapporteur on new complaints and interim measures, requested the State party not to deport the complainant to Sri Lanka while the complaint was being considered by the Committee. On 20 June 2016, the State party requested the Committee to lift the interim measures. On 21 December 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, denied the State party's request to lift the interim measures. On 12 May 2017, the State party again requested the Committee to lift the interim measures.

The facts as presented by the complainant

2.1 The complainant is a Tamil from Palai village, located in the Northern Province, and grew up in the districts of Kilinochchi and Jaffna, but moved frequently because of the conflict. To avoid forced recruitment by the Liberation Tigers of Tamil Eelam (LTTE), from 2006 to 2008, he lived and worked in Qatar. In early 2009, he returned to Sri Lanka to take care of his sick mother and was detained and interrogated upon arrival at Colombo

* Adopted by the Committee at its sixty-first session (24 July-11 August 2017).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sebastien Touzé and Kening Zhang.

GE.17-16481(E)

Please recycle

Airport. He was released after bribing some officials. After his release, he went to Jaffna and worked as a delivery driver for Tamil merchant who sold soft drinks.

2.2. The complainant alleges that, in early 2009,[1] he was abducted by soldiers while unloading soft drinks at his workplace in Jaffna.[2] There had been a bomb blast in the area that morning and the police thought that he had connections with LTTE since he was driving a delivery truck. The complainant claims that he was blindfolded and taken to what he assumes was an army camp. Over the first two or three days, he was kicked and punched and several bones in his hand were broken.[3] He alleges that he was interrogated and physically assaulted by a Tamil-speaking soldier, who repeatedly accused him of being a member of LTTE. He did not receive appropriate medical care for his injuries and was kept in isolation, in a small, dark, underground room. The complainant believes that he was held there for a month and a half, during which he was regularly beaten. As a result, he suffers memory loss. The complainant states that he was released after his mother paid a bribe of 30,000 rupees, as demanded by the soldiers. After his release, he was allowed to travel to Colombo to get his injuries treated at Sri Ganesha Dispensary, a private hospital. After that incident, the complainant's mother was afraid for his life and encouraged him to leave Sri Lanka. He left the country by air, using his own passport, and went to Malaysia,[4] where he stayed for 15 months. The complainant asserts that, after his departure for Malaysia, the Criminal Investigation Department or the Sri Lanka Army came to look for him at his house several times.[5] The complainant later went to Thailand, then to India, where he applied for a visa and remained for approximately one year before travelling to Australia by boat.

2.3. The complainant arrived in Australia on 11 May 2012. He applied for a protection visa on 6 August 2012. His application was refused on 11 September 2012 by the representative of the Minister for Immigration and Border Protection further to section 65 of the Migration Act. The representative refused the application because, while he found that the applicant was credible and accepted his claims, he did not consider that there was a real risk that he would be prosecuted or suffer significant harm if returned to Sri Lanka as the security situation had improved since 2009. The complainant applied to the Refugee Review Tribunal and appeared before it on 6 December 2012, 2 August and 12 September 2013. On 4 October 2013, the Tribunal upheld the Ministerial decision.[6] The Tribunal considered that the applicant was not a person with respect to whom Australia had protection obligations under the "refugee" criterion because, after considering the evidence, it found that there was no real chance that the applicant would be subjected to serious harm amounting to persecution because he is of Tamil ethnicity, because of his real or imputed political opinion, or for being a failed asylum seeker. The Tribunal did not find substantial grounds for believing that the complainant would be at real and foreseeable risk of suffering significant harm, if returned to Sri Lanka.

2.4. The complainant appealed the Tribunal's decision to the Federal Circuit Court of Australia, submitting that the Tribunal failed to take into account his claim that he feared abduction and extortion by armed groups.[7] The appeal was dismissed on 13 August 2014. The Federal Circuit Court upheld the Refugee Review Tribunal's decision and found that it

[1] The complainant does not provide a specific date.

[2] According to the complainant, Jaffna was heavily militarized at that time owing to the establishment of a Security Force Headquarters in the district.

[3] The complainant provided an undated medical certificate from a dispensary, in which it is indicated that the complainant was treated for a wound in his hand on 5 January 2009 (the rest of the section on treatment is illegible).

[4] The complainant does not provide a specific date.

[5] The complainant claims that the Criminal Investigation Department visited his house twice while he was in Malaysia. In July or August 2012, the Army came to his house again and asked if he was in Australia. They came again one or two months before the Refugee Review Tribunal's hearing on 6 December 2012. The complainant claims that, after he had left for Malaysia, his family reported him missing in order to avoid the Army coming to look for him. However, Army officers kept coming to the house to look for him.

[6] The complainant provided a copy of the decision.

[7] The complainant does not provide further details.

had not incurred any legal error. Thus, the Federal Circuit Court dismissed the complainant's application for judicial review.

2.5. The complainant appealed that decision before the Federal Court of Australia, where the matter was heard on 23 February 2015. He contended that the Refugee Review Tribunal did not take into account some of the evidence[8] that he had presented. On 2 March 2015, the Federal Court upheld the decision of the Federal Circuit Court and dismissed the appeal. On 3 June 2015, the complainant's application to the Minister for Immigration and Border Protection for Ministerial intervention[9] was rejected.[10]

The complaint

3.1 The complainant submits that if he is returned to Sri Lanka, he faces a real risk of being tortured and subjected to cruel, inhuman, degrading treatment and punishment at the hands of the Criminal Investigation Department and the paramilitary groups associated with the Government of Sri Lanka.[11] Therefore, Australia would be violating article 3 of the Convention, in particular the non-refoulement obligation. He states that internal relocation in Sri Lanka is not an option, since the Government now controls the whole country and those who departed illegally and/or failed asylum seekers are immediately detected and taken into custody by the authorities upon arrival at Colombo Airport.

3.2. The complainant claims that there are substantial grounds to believe that he would be at a real risk if he is returned to Sri Lanka, as he is a young Tamil man who would be suspected of being affiliated with LTTE.[12] He submits that, if he is returned to Sri Lanka, it is likely that he will be detained in Negombo Remand Prison. He states that it is well documented that the prison is cramped and unsanitary; there is little chance to exercise; and it is overcrowded to the extent that the prisoners have to take turns to sleep. He submits that that alone constitutes degrading treatment, regardless of the length of time spent there on remand.

State party's observations on admissibility and the merits, and request to lift interim measures

4.1 By note verbale of 16 June 2016, the State party provided its observations on the admissibility and merits of the complainant's communication and requested the Committee to lift the interim measures.

4.2 The State party submits that the complainant's allegations are inadmissible on the ground that his claims are manifestly unfounded pursuant to rule 113 (b) of the Committee's rules of procedure. However, should the Committee consider the complainant's allegations admissible, the claims are without merit as they have not been supported by evidence showing that there are substantial grounds for believing that the complainant would be in danger of being tortured, as defined in article 1 of the Convention upon return to Sri Lanka.

---

[8] The complainant submitted that the Tribunal's finding was in relation to a risk of harm by the Sri Lanka authorities and not to his claim of risk of harm from persons other than the authorities, such as armed groups.

[9] Requested further to section 417 of the Migration Act (1958).

[10] The complainant alleges that he is unable to locate the copy of the letter from the Minister for Immigration and Border Protection rejecting his request for Ministerial intervention. He asserts that, owing to his frequent change of residence, some of his personal effects, including the letter, have been misplaced.

[11] The complainant annexes the results of a study carried out by the Edmund Rice Centre (published in 2015) on the case of four returnees from Australia who had been tortured by the Sri Lanka security agencies and paramilitary organizations after their return to Sri Lanka. He also provides a report by the Office of the United Nations High Commissioner for Human Rights (OHCHR) investigation team in Sri Lanka dated 16 September 2015 (A/HRC/30/CRP.2) which highlights that torture is prevalent in the country.

[12] The complainant provides Human Rights Watch, *World Report 2015: Sri Lanka*, which indicates that "the government's treatment of Tamils forcibly returned to Sri Lanka after being denied asylum overseas continues to be a significant concern".

4.3 The State party recalls that the non-refoulement obligations are contained in article 3 of the Convention and do not extend to cruel, inhuman or degrading treatment or punishment. It submits that the complainant's claim concerning possible incarceration on return to Sri Lanka, including the prison conditions, should be ruled inadmissible pursuant to article 22 (2) of the Convention and rule 113 (c) of the Committee's rules of procedure as being incompatible with the provisions of the Convention.

4.4 The State party submits that it is the responsibility of the complainant to establish a prima facie case for the purpose of admissibility of his complaint and he has failed to do so. The complainant's claims have been thoroughly considered by a series of domestic decision makers, including the Department of Immigration and Border Protection, in the assessment of his protection visa application, and the Refugee Review Tribunal. The complainant also sought a judicial review by the Federal Circuit Court of Australia and the Federal Court of Australia for legal error in the decision of the Tribunal. His claims were also assessed during the Ministerial intervention process. Robust domestic processes considered the complainant's case and determined that his claims were not credible and did not engage the State party's non-refoulement obligations. In particular, his claims were assessed under the complementary protection provisions of section 36 (2) (aa) of the Migration Act, which reflects the State party's non-refoulement obligations under the Convention and under the International Covenant on Civil and Political Rights.

4.5 The State party refers to the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention, in which it is stated that the Committee is not an appellate or judicial body, but rather gives considerable weight to findings of fact that are made by organs of the State party concerned. It requests the Committee to accept that it thoroughly assessed the complainant's claims through its domestic processes and found that it does not owe the complainant protection obligations under the Convention. The State party nonetheless acknowledges that complete accuracy is seldom to be expected by victims of torture[13] and that factor was taken into consideration by all the domestic decision makers in forming their views on the complainant's credibility. For example, in assessing the complainant's protection visa application, the decision maker found him to be generally credible and had no reason to doubt his credibility as the information provided had been consistent throughout his entry and protection visa interviews.

4.6 The complainant filed an application for a protection visa on 6 August 2012 after the Minister for Immigration and Border Protection intervened to allow him to apply under section 46A of the Migration Act.[14] The Minister also intervened pursuant to section 195A of the Act to grant the complainant a bridging visa on 30 August 2012 to allow his release from immigration detention while his protection visa application was under consideration.[15] On 11 September 2012, the complainant's protection visa application was refused. The decision maker interviewed the complainant (with the assistance of a Tamil-language interpreter) and considered relevant material, such as country information provided by the Department of Foreign Affairs and Trade and available open source material. The complainant claimed that he feared serious harm, including the possibility of death, if he returned to Sri Lanka.

4.7 The decision maker considered whether Tamils, as a group, were persecuted by the authorities in Sri Lanka. Although accepting that the complainant's detention in 2009 was persecutory, the decision maker considered that the test for protection was forward looking and, with reference to relevant country information, concluded that persons of Tamil ethnicity were not persecuted in Sri Lanka solely for reasons of being Tamils.[16] The

[13] See communication No. 21/1995, *Alan v Switzerland*, decision of 8 May 1996, para 11.3.

[14] Section 46A of the Migration Act (1958) provides that a person who is in Australia and who is an unlawful non-citizen may not make a valid application for a visa. The Minister may lift this bar if he or she that it is in the public interest to do so.

[15] Section 195A of the Migration Act (1958) provides that the Minister may grant a visa to a person who is in immigration detention if the Minister thinks that it is in the public interest to do so.

[16] Country information considered included Office of the United Nations High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the Protection Needs of Asylum-Seekers from Sri Lanka* (5 July 2010) which states that "there is no longer a need for group-based protection

decision maker was satisfied that, although the complainant would be subject to questioning at Colombo Airport about his Tamil ethnicity and possible links to LTTE, he would not be subjected to any persecutory harm because of that. The decision maker noted that the complainant had no connection at all to LTTE nor any other profile of significance and that the conflict between the Sri Lankan authorities and LTTE had ended in May 2009.

4.8 The decision maker accepted that the complainant had been beaten during interrogation when he was detained by the authorities following a bomb blast in 2009. However, the decision maker concluded, based on the complainant's evidence, that the trigger for his detention at that time no longer existed in Sri Lanka, as bomb blasts, which were a regular occurrence during the conflict, and subsequent roundups had now ceased. Referring to open source material, the decision maker acknowledged that the types of beatings and physical violence feared by the complainant did continue to occur in some cases but that the complainant did not have a profile that would lead him to be subject to such beatings. Furthermore, the Refugee Review Tribunal considered country information that indicated that people were leaving Sri Lanka for economic reasons, not persecution, and the United Nations had reported that more than 440,000 persons had returned to the North of Sri Lanka since the end of the war. The decision maker concluded that, given such massive returns, the United Nations considered the situation safe for returnees and that the generalized fear of the authorities previously held by Tamil males was no longer supported by the evidence.[17]

4.9 The decision maker also noted that the complainant had left Sri Lanka legally on two occasions and had not suffered ill-treatment either upon exiting or upon re-entering in 2009.[18] Based on country information indicating that the security situation for Tamils had improved significantly since the end of the war, the decision maker concluded that the complainant was less likely to suffer persecutory harm now than he was when he previously exited and re-entered Sri Lanka. Having applied the relevant country information to the circumstances and profile of the complainant, the decision maker concluded that he did not have a profile of significance and did not have a well-founded fear of persecution upon return. The decision maker also concluded that the complainant's cumulative claims of being a young Tamil man, with origins in the North of Sri Lanka, the single episode of his detention by the Sri Lanka Army and his return following a failed asylum attempt do not give rise to a reasonable belief that he would face a real risk of persecution in any part of Sri Lanka.

4.10 The complainant subsequently applied to the Refugee Review Tribunal for a merits review of the Immigration and Border Protection decision on 9 October 2012. He was present at the Tribunal hearing and was able to make oral submissions with the assistance of a Tamil interpreter and was represented by a registered migration agent. Like the Immigration and Border Protection official, the Tribunal accepted that the complainant had been arrested, detained and beaten by the Sri Lanka Army in early 2009 and that he was released upon payment of a bribe. The complainant was not able to detail exactly when in 2009 he was arrested, and stated that the beatings he had sustained in detention had affected his memory. The Tribunal noted that the evidence provided by the complainant was inconsistent with respect to the length of time that he was detained: at the hearing, he

---

mechanisms or for a presumption of eligibility for Sri Lankans of Tamil ethnicity originating from the north of the country".

[17] Reference to Integrated Regional Information Network, "Sri Lanka: Government welcomes refugee repatriation from India", 30 August 2012.

[18] It is not clear whether the complainant returned to Sri Lanka in 2008 or 2009. During the protection visa assessment process, he claimed that he had spent the period from 2006 to 2008 working in Qatar and returned to Sri Lanka from Qatar when his visa expired and because his mother was unwell, referred to as being either in 2008 or 2009. During the interview with the Refugee Review Tribunal, the complainant claimed that he had returned to Sri Lanka in 2008 and planned to remain for a few months then travel again to Qatar, but was prevented from leaving the country because the Sri Lanka Army refused to issue a clearance certificate, despite the fact that he showed them his passport and explained that his visa for Qatar had not yet expired (but was close to expiry). In his submissions to the Committee, the author puts forward a new claim that he returned to Sri Lanka in early 2009 from Qatar and on return was detained and interrogated at Colombo Airport.

claimed that he was held for 20 days, whereas in his protection visa application he claimed that he was held for a month and a half. The Tribunal provided the complainant with an opportunity to clarify the inconsistency; in doing so, he stated that he gave the wrong timeframe because he was confused and had forgotten. The Tribunal expressed doubts about the complainant's claim that his memory was affected, given that he was able to detail the injuries sustained from the beating but did not explain how the beating may have affected his memory. The Tribunal did not accept that the complainant was held for a month and a half and found that he had exaggerated the time frame.

4.11 Furthermore, the Tribunal considered that the complainant's evidence in respect of the reasons for his arrest and release were somewhat vague. The Tribunal did not accept that the complainant was suspected of being a member of LTTE and indicated to him that it was possible that his captors never suspected that in the first place, and may have just been looking for a bribe, which they eventually received. The Tribunal also noted the finding in the Immigration and Border Protection decision that, based on the evidence given by the complainant, his arrest was part of a routine roundup followed a bomb blast. Given that the incident took place in 2009, the Tribunal expressed doubts that it would result in the complainant attracting attention if he returned to Sri Lanka.

4.12 The Tribunal examined the complainant's claim that when he returned to Sri Lanka in 2008, he had planned to remain for a few months then go back to Qatar, but was prevented from leaving by the Sri Lanka Army. The Tribunal accepted that it was plausible that the complainant would have been refused clearance to leave Jaffna in 2009 and that he was subsequently cleared to travel to Colombo for medical reasons. However, the Tribunal did not accept that the complainant was treated in hospital for the length of time that he claimed — every other day for a month — given that he could not remember the name of the hospital, its location or the address of the lodge where he stayed.

4.13 The Tribunal examined the complainant's claim that the Criminal Investigation Department or the Sri Lanka Army went to his house after he had left Sri Lanka — twice when he was in Malaysia, on another occasion in July or August 2012, when they asked whether he was in Australia, and again, a month or two before the first Refugee Review Tribunal hearing on 6 December 2012. While the Tribunal accepted that the authorities visited his home after his departure for Malaysia, it found that those visits were in response to a report made by his family to the police that the complainant was missing; they were not an indication that he was of adverse interest in Sri Lanka. The Tribunal did not accept that he paid bribes to leave Sri Lanka for Malaysia in 2009 and noted that, if he were of interest, he would not have been cleared by the Sri Lanka Army to travel to Colombo for medical treatment in 2009. The Tribunal found it implausible that, after the complainant had arrived in Australia on 11 May 2012 — more than three years after leaving Sri Lanka — the authorities would have visited his home and asked whether he was in Australia.

4.14 The Tribunal, in affirming the Immigration and Border Protection decision not to grant the complainant a protection visa, also referred to relevant country information, including *UNHCR Eligibility Guidelines for Assessing the Protection Needs of Asylum-Seekers from Sri Lanka* (5 July 2010), which supported the view that the complainant would not be harmed because he was a Tamil or specifically a Tamil from the North of Sri Lanka. The Tribunal explained to the complainant that the country information, which stated that the Government of Sri Lanka government was working to identify Tamil activists and supporters of Tamil separatism, may lead it to find that he was not at risk of harm as the evidence he provided did not indicate that he had such a profile. The complainant chose not to make any oral submissions in response to that explanation, but made a submission after the hearing, which contained different country information. The Tribunal considered that information, but concluded that the country information that it had, including the UNHCR eligibility guidelines, was preferable and of greater evidentiary weight.

4.15 In addition to the complainant's protection claims, the Tribunal considered the claim put forward by the complainant's migration agent that he was likely to be imprisoned and subjected to significant harm in custody, under the complementary protection criteria. As the complainant had departed Sri Lanka legally, the Tribunal found that he would not be

detained upon return and, therefore, there was no real risk that he would be remanded in custody or significantly harmed while on remand.

4.16 On 13 August 2014, the Federal Circuit Court dismissed the complainant's application for judicial review of the Refugee Review Tribunal decision. Through counsel, the complainant claimed before the Circuit Court that the Tribunal had erred in its procedure by failing to consider a claim or a component of a claim. The Circuit Court concluded that the Tribunal had dealt properly with the complainant's claims. It recalled that omission to refer to a piece of evidence does not necessarily mean that it was overlooked, and concluded that, while there may have been a failure on the part of the Tribunal to refer to a piece of evidence, there was no failure in dealing with an integer of the complainant's claims.[19]

4.17 On 3 September 2014, the complainant filed an application with the Federal Court of Australia to appeal the decision of the Federal Circuit Court. On 2 March 2015, the Federal Court dismissed the complainant's application for judicial review of the Circuit Court's decision. The complainant was present at the Federal Court hearing and was represented by counsel. The Federal Court upheld the Circuit Court's decision and concluded that he had raised no new claim or integer of a claim that was sufficiently apparent in the material before the Tribunal for it to require separate consideration.

4.18 On 3 June 2015, the complainant requested Ministerial intervention under section 417 of the Migration Act and Minister for Immigration and Border Protection initiated action under section 48B of the Migration Act. Immigration and Border Protection determined that there was no credible new information provided in the request for Ministerial intervention to indicate that the complainant had an enhanced chance of making a successful protection visa application. Therefore, on 27 August 2015, Immigration and Border Protection determined that the complainant's claims did not meet the criteria for Ministerial intervention under section 48B of the Migration Act and that his claims did not meet the criteria under section 417 of the Act. On 8 September 2015, the Assistant Minister for Immigration and Border Protection declined to exercise her power under section 417 of the Migration Act to intervene in the case.

4.19 The State party further clarifies a number of issues that were raised in the complainant's submission. Concerning the complainant's new claim in his submission to the Committee that, upon returning from Qatar in early 2009, he was detained and interrogated at Colombo Airport and released only after paying a bribe to the authorities, the State party submits that that claim was not raised in the domestic processes. The complainant indicated to the Refugee Review Tribunal that he had returned to Sri Lanka in late 2008, but did not mention that he had experienced difficulties upon his return. Rather, he claimed that when he attempted to travel to Qatar again, he was prevented from departing Sri Lanka by the Sri Lanka Army, which was accepted by Tribunal. Immigration and Border Protection assessed that new claim and does not accept it as being credible on the basis that the complainant had not previously claimed that he had had difficulty when he returned to Sri Lanka. His original and slightly different claim was that he was prevented from leaving Sri Lanka to return to Qatar, which was accepted by the Tribunal. The State party notes that the date on which the complainant returned to Sri Lanka was unclear and has been variously recorded as 2008 and 2009. The complainant has also been inconsistent about whether, when he did return to Sri Lanka, his visa was expired or nearing expiry.[20] In his submissions to the Committee, the complainant claims that he returned to Sri Lanka in early 2009 but does not explain how this point in time is connected to the expiry or not of his visa for Qatar.

4.20 As regards the complainant's new claim that his membership in Tamil social groups and contact with members who departed Sri Lanka illegally and sought asylum in Australia

[19] The Federal Circuit Court found that the complainant's claim of risk from armed groups was not clearly made and apparent in the material before the Refugee Review Tribunal.

[20] It is noted that, during the protection visa assessment process, the complainant claimed that he had spent the period from 2006 to 2008 working in Qatar and returned to Sri Lanka from Qatar when his visa expired; however, he later claimed before the Tribunal that he was prevented from returning to Qatar because his visa was close to expiry.

would put him at risk of harm, the State party submits that he has not provided evidence to substantiate that claim. Immigration and Border Protection consulted recent country information, which suggested that Tamils suspected of having links to LTTE may be detained and tortured upon return,[21] however, the complainant has been found not to have any connections to LTTE.[22] The State party contends that, if he is associated with any Tamils who had departed Sri Lanka illegally and who were returned as failed asylum seekers, there would likely be no risk to him as a result of such association.

4.21 With regard to the new pieces of evidence provided by the complainant in his submission to the Committee, notably a medical certificate attesting that he suffered a broken hand during his detention by the Sri Lanka Army, the Refugee Review Tribunal accepted the complainant's claim his hand was injured and that it may have occurred during his detention by the Army. It also accepted his claim that he was cleared to travel to Colombo for medical reasons. The Tribunal further accepted that the harm referred to in this evidence occurred in the past, however, it did not find that the complainant would be at risk of harm or persecution at the present time, as he is not of interest to the authorities. Therefore, the State party maintains that the medical certificate does not alter the basis for the Tribunal's finding.

4.22 As regards a copy of an affidavit signed by the complainant's mother, in which she claims that the complainant was employed by LTTE from 2002 to 2006; detained upon his return to Sri Lanka from Qatar; she sold her property to pay for his journey to Australia; and he is of interest to the authorities and will face death if returned to Sri Lanka, the State party notes that the complainant has never claimed involvement with LTTE and, in fact, has denied any involvement. In fact, the Tribunal found that he is not suspected of LTTE involvement nor of interest to the authorities. Therefore, the Immigration and Border Protection gave little weight to that piece of evidence. Lastly, the complainant provided a copy of a deed of sale for his mother's property to demonstrate that his mother had financed his travel, as she claimed. However, the State party notes that the issue of the sale of land is not material to the complainant's claims of risk of harm upon return to Sri Lanka. The State party submits that Immigration and Border Protection assessed those new pieces of evidence and did not accept that they, on their own or in conjunction with the previous findings, provided any new information to indicate that the State party's non-refoulement obligations under article 3 of the Convention would be engaged if the complainant was returned to Sri Lanka.

4.23 Finally, the State party challenges the complainant's claim that internal relocation is not an option within Sri Lanka for a person at risk from the authorities since the Government controls the whole of Sri Lanka and persons who departed illegally and failed asylum seekers are immediately detected and taken into custody upon arrival at Colombo Airport. In that regard, the State party asserts that the complainant is not of adverse interest to the authorities and he would not be remanded in custody upon return because he departed Sri Lanka legally. It claims the complainant provided outdated country information on the human rights violations in the region where he is from in Sri Lanka, and during all the assessments, the domestic decision makers took into account current and relevant

[21] See Human Rights Watch, *World Report 2016: Sri Lanka*. Available at www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf, pages 530-532.
See Amnesty International, *Amnesty International Report 2015/16: Sri Lanka*. Available at www.amnesty.org/en/documents/pol10/2552/2016/en/.

[22] The State party states that advice from the British High Commission reveals that Tamils can be, but would not usually be, charged with illegally departing Sri Lanka, and there is no mention of any mistreatment occurring to illegally departed persons on this basis (see United Kingdom, Home Office, *Sri Lanka — Bulletin: Treatment of Returns*, December 2012, pp. 105-106). Furthermore, the Government of Sri Lanka has taken various steps towards reconciliation with Tamils and is encouraging their return to the country (see "Sri Lanka delists several alleged pro-LTTE organizations and individuals from terror list", *Colombo Page*, 21 November 2015. Available from www.colombopage.com/archive_15B/Nov21_1448122543CH.php; also "Canada, Australia leaders commend President Sirisena on remarkable changes brought to governance in Sri Lanka", *Colombo Page*, 29 November 2015. Available from www.colombopage.com/archive_15B/Nov29_1448776552CH.php.).

information. The State party refers to the Committee's jurisprudence and recalls that the existence of a general risk of violence does not constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon return to a country; additional grounds must exist to show that the individual concerned would be personally at risk.[23] It maintains that the complainant has not established the existence of additional grounds to show that he is at a foreseeable, real and personal risk of torture if returned to Sri Lanka.

Complainant's comments on the State party's observations

5.1 On 16 November 2016, the complainant's representative submitted his comments on the State party's observations. He highlights the fact that the State party acknowledges that the representative of the Minister for Immigration and Border Protection recognized that the complainant's detention in 2009 was persecutory, yet argues that, at the time of the decision, the cause of the persecution no longer existed. According to the complainant, it follows from that persecution that he had good cause to flee Sri Lanka and seek asylum. He disputes the State party's argument that he does not have a profile of significance and that the cessation of open hostilities in May 2009 between the Government of Sri Lanka and LTTE means that there is no danger.

5.2 The complainant submits that the State party's authorities accepts that he was beaten after the bomb blast in 2009 and that he was detained and beaten because of the bomb blast, yet it failed to accept that the detention and beating occurred because he was suspected of being involved in the bomb blast, more specifically, that he was suspected of being actively engaged in violent LTTE actions. He argues that, while he, himself, did not have any links to LTTE, in the minds of the security forces, he was linked to LTTE in 2009. He claims that there is a real danger that the authorities in Sri Lanka continue to suspect him of links to LTTE and he will become a target of torture during interrogation as a result. The complainant submits that the fact that he was tortured in the past is a good indicator that he will be tortured in the future.

5.3 The complainant argues that the reasoning of the representative of the Minister for Immigration and Border Protection, based on the country information, that people were leaving Sri Lanka for economic reasons and because of persecution, cannot be applied to in his case to dismiss the concrete personal claims being made, especially since there were no significant credibility findings against him.[24] The findings affirm that the complainant was persecuted and subsequently fled Sri Lanka. Therefore, it is reasonable to conclude that the general country information to the contrary no longer applies to his case. The same goes for the argument about the massive returns to Sri Lanka. His case should be assessed on its own merits and not compared to cases that do not share the same characteristics.

5.4 The complainant claims that, while the representative of the Minister acknowledged that he had suffered persecution, it was concluded that the original reasons for the persecution no longer existed, therefore the complainant would no longer be persecuted for those reasons on his return. He argues that the decision of the State party's authorities' attempts to exclude him from any other persecutory profile, but at no point does it attempt to consider whether, as a result of past persecution, there is an existing profile that would place him in real danger of torture or inhuman treatment. He states that the assessment of the non-refoulement obligations was "little more than ticking a few legal boxes: there was no substantive consideration of the obligations".

5.5 Furthermore, the complainant challenges the reasoning of the Refugee Review Tribunal, which accepted that he had been detained and beaten but did not find it credible that he could not explain how the beating may have affected his memory. He claims that the Tribunal's credibility findings against him are unreasonable because if it accepted that he had been beaten, it should understand that it is likely that he would have some symptoms of

[23] See communication No. 83/1997, *G.R.B v. Sweden*, Views adopted on 15 May 1998, para. 6.3.

[24] The complainant quotes the representative of the Minister: "I found no reason to doubt the credibility of the applicant. His information remained consistent through his entry and PV interviews and I have proceeded on the basis that he is generally credible."

post-traumatic stress disorder.[25] He further argues that understanding of the effects of trauma was within the Tribunal's purview. The Tribunal had at its disposal a document entitled *Guidance on Vulnerable Persons*, which was prepared for use by the Migration Review Tribunal and the Refugee Review Tribunal, and in which a lengthy section is dedicated to impairments associated with torture and other traumatic experience. The Guidance suggests strategies to use when dealing with people with such impairment. The complainant claims there is no evidence that the Refugee Review Tribunal applied any of them. The complainant, on the other hand, is not trained in psychology and had only his experience to go on, and he did not have the language to provide a more convincing explanation. Therefore he was limited to describing his symptoms as "affected memory" and attributing the cause as being the detention and the beatings.

5.6 In that regard, the complainant refers to the Committee's practice in such contexts, in recognizing that inconsistencies are to be expected from people who have suffered trauma.[26] He claims that, in fact, the Tribunal ignored its own guidelines on vulnerable people such as victims of trauma, especially with respect to credibility findings. The Tribunal simply found that there was a discrepancy and that the complainant could not satisfactorily explain it, therefore he embellished his claims. In other words, he lied. The complainant also affirms that he secured a witness statement[27] in support of his contention that he was detained for over a month by the Army in 2009.

5.7 The complainant reiterates that it was obvious that the security forces suspected him, albeit, along with others, of involvement in the bomb blast, which is to say, involvement with LTTE. The Tribunal raised the possibility that the police were seeking a bribe; however, that is not necessarily a motive exclusive of the former: the bribe was sought because the police felt that it had grounds to detain him, that is, suspicion of involvement in the bomb attack. It is unreasonable to attempt to separate one possible motive from the other, and then attribute the actions to one motive and not to the other in the absence of further evidence. The complainant alleges that the Tribunal indulged in pure speculation about the motives of the persecutors, for which it had no evidence. The complainant reiterates that insufficient benefit of the doubt relating to the accepted fact of trauma was accorded to him.

5.8 The complainant also disputes the Tribunal's reasoning in accepting that the police visited his home, but attributing the motive as being merely in response to a report made by his family that he was missing. Instead, the complainant contends that the report about his disappearance was made by his family following the visit in order to prevent further visits. It is very difficult to imagine his family's motive for make a missing person report with regard to the complainant if the sequence of events were as the Tribunal speculated. His family knew where he was, so reporting him as missing was not an attempt to discover his whereabouts. Reporting to the police that he was missing so that the police would visit the house seems an extraordinary strategy upon which to embark: the supposed desired result of inciting a visit from the police would be of very small advantage to the family or the complainant and of considerable risk because it would be attracting the attention of the police in circumstances where the person in question had been "a person of interest" (in a non-technical sense) to the police, who, according to the Tribunal's speculation, would have had no other interest. The motivation for the family to behave in this speculated fashion is unclear and unlikely and the Tribunal is silent on that aspect. The complainant was generally considered to be a credible witness, except for, as the complainant contends, the unreasonable negative findings by the Tribunal.

[25] There is no medical certificate in the file.

[26] See David Weissbrodt and Isabel Hortreiter, "The principle of non-refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in comparison with the non-Refoulement provisions of other international human rights treaties", *Buffalo Human Rights Law Review*, vol. 5 (1999), available at http://scholarship.law.umn.edu/faculty_articles/362; also communication No.15/1994, *Khan v. Canada*, Views adopted on 15 November 1994.

[27] No such witness statement is on file.

5.9 Given so many unreasonable attempts to arrive at negative credibility findings, the complainant contends that the Tribunal was acting with apprehended bias against him. He adds that the Tribunal's findings with respect to complementary protection were "extremely sparse" — three 3 short sentences: (a) if he were to be imprisoned then reports of mistreatment of Tamils and of conditions generally in Sri Lankan prisons would not amount to a real risk of significant harm; (b) it is not likely that he would be arrested since he left Sri Lanka legally; (c) he would not be harmed otherwise because of his Tamil ethnicity, even one from the North, his imputed political opinion, his status as a failed asylum seeker, or suspicions of links to LTTE. All were discounted when considering his claims under the Refugee Convention. The complainant claims that the Tribunal did not assess whether there was a real risk of arrest, detention or harassment in relation to the persecution that he had suffered in 2009; whether his attempt to seek asylum after that persecution would revive suspicions of LTTE involvement, as the fact that he fled the country may easily be taken to be an indicator of guilt; and whether he faced danger as a witness to police persecution.

5.10 The complainant maintains that the conclusions of the Tribunal's assessment of prison conditions was in stark contrast to that of the United Nations Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment who considered that the conditions in Sri Lankan prisons may well amount to "cruel, inhuman and degrading treatment".[28] The complainant claims that, in retrospect, the Tribunal's judgment shows a certain lack of diligence to enquire into the matter. It did not assess the real risk of torture for those held in detention and, notwithstanding mention about the prison conditions, it ignored the common practices of torture under interrogation carried out by the Sri Lanka security forces, in places of detention.

5.11 The complainant maintains that the rule of law in Sri Lanka is still of grave concern and refers to the observations of the United Nations Special Rapporteur on the independence of judges and lawyers on her visit to Sri Lanka.[29] The Special Rapporteurs stated that, despite some political reforms after the 2015 elections, there were serious problems in Sri Lanka concerning the rule of law and, in particular, that torture was common in a large majority of cases. The police continued to act with impunity. The complainant submits that the Refugee Review Tribunal did not assess the risk that the police may retaliate against him precisely because its officers behaved in a persecutory manner towards him in 2009. Although this was not a claim made to the Tribunal, a reasonable assessment of the State party's non-refoulement obligations would have assessed that possibility.

5.12 The complainant states that, since he has been a victim of persecution and torture in the past and since the United Nations continues to urge Sri Lanka to fully investigate events — especially in the North — during the final stages of the war in relation to allegations of war crimes and forced disappearances, there is considerable concern for the safety and well-being of those who may be considered witnesses to such events; he claims that he is such a witness. The Tribunal also did not assess whether the trauma that he suffered in 2009 would affect the complainant on facing the Sri Lanka police again and that his behaviour would revive their suspicions of him. A traumatized suspect is likely to behave in ways that provoke further suspicion, as their exacerbated fear may make them appear as if they have something to hide.

5.13 The complainant accepts that the Refugee Review Tribunal can only assess claims that are raised directly before it and claims that the issue of conditions in Sri Lanka prisons, for instance, was raised before the Tribunal. He submits that the fact that he had already been beaten while under interrogation in detention surely raises the possibility of it recurring if he were to return. The complainant requests that the Committee not only review the decision process undertaken by the authorities of the State party, but also assess the

[28] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19943&LangID=E. The Special Rapporteur was persuaded that torture by the Criminal Investigation Department and the Terrorism investigation Department was a common practice. He noted that confessions were still a primary method of securing convictions in Sri Lanka and that prolonged detention without trial could be an incentive to torture.

[29] See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19942&LangID=E.

danger to him now. He claims that there is the risk of a real danger to him and that the type of treatment to which he would be exposed qualifies as torture. Lastly, the complainant recalls that his profile has a number of elements that would put him at risk if returned: he is a Tamil from the North of Sri Lanka; he has already been tortured by the Sri Lanka police in relation to a bomb blast linked to LTTE; and he has already been detained by migration officials in Sri Lanka and only released by paying bribes.

State party's additional submission and request to lift interim measures

6.1 By note verbale of 6 April 2017, the State party reiterated its submission of 16 June 2016 and informed the Committee that it did not intend to file further submissions at this stage.

6.2 By note verbale of 12 May 2017, the State party requested the Committee to withdraw its request for interim measures on the basis of the conclusions reached in the domestic processes, as outlined in previous submissions.[30]

Complainant's comments on the State party's additional submission

7. On 20 June 2017, the complainant's representative resubmitted his comments of 16 November 2016.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 The Committee notes the State party's submission that the present communication is manifestly unfounded and thus inadmissible pursuant to rule 113 (b) of the Committee's rules of procedure. The Committee, however, considers that the communication has been substantiated for the purposes of admissibility, as the complainant has sufficiently detailed the facts and the basis of his claim for the Committee's consideration.

8.3 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. It notes that, in the present case, the State party has not contested that the complainant has exhausted all available domestic remedies. The Committee therefore finds that it is not precluded by article 22 (5) (b) of the Convention from examining the present case. As the Committee finds no further obstacles to admissibility, it declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 In accordance with article 22 (4) of the Convention, the Committee has considered the present communication in the light of all the information made available to it by the parties.

9.2 In the present case, the Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Sri Lanka. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned. It follows

[30] The previous submissions are annexed to the note verbale.

that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.[11]

9.3 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable (para. 6), the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk. Although, under the terms of its general comment No. 1, the Committee gives considerable weight to findings of fact that are made by organs of the State party concerned,[12] it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, to freely assess the facts based upon the full set of circumstances in every case.

9.4 The Committee notes the State party's observation that its domestic authorities found the complainant to be generally credible. It also notes that the State party's authorities accepted many of the complainant's claims, notably that he had been ill-treated in the past, yet did not assess that that could create a risk for him at the present time, as he has no links with LTTE. The Committee observes that the complainant left Sri Lanka legally on two occasions and did not suffered any ill-treatment upon exiting or upon returning in 2009. As regards allegations about conditions in Negombo Remand Prison, the Committee observes that, as the complainant departed Sri Lanka legally, it is unlikely that he would be detained upon return or remanded in custody or significantly harmed in prison.

9.5 The Committee takes note of the complainant's disagreement with the reasoning and the outcome of the domestic processes. It observes, however, that the complainant has not demonstrated any irregularity in the domestic processes. In the absence of any pertinent information or documentation on file, there is no evidence that would lead to the conclusion that the domestic decision maker was biased against the complainant.

9.6 Regarding the complainant's general claim that he risks being subjected to torture upon return to Sri Lanka owing to his status as a Tamil with real or perceived links to LTTE and as a failed asylum seeker returning from overseas, the Committee agrees that Sri Lankans of Tamil ethnicity with a real or perceived prior personal or familial connection to LTTE and who are facing forcible return to Sri Lanka may face a risk of torture. In that connection, the Committee notes the current human rights situation in Sri Lanka and refers to its concluding observations on the fifth periodic report of Sri Lanka, in which it expressed concern about, inter alia, reports regarding the persistence of abductions, torture and ill-treatment perpetrated by State security forces in Sri Lanka, including the military and the police,[13] which had continued in many parts of the country after the conflict with LTTE had ended in May 2009, and to credible reports by non-governmental organizations[14] concerning the treatment of returned individuals by the Sri Lankan authorities.[15] However, the Committee recalls that the occurrence of human rights violations in one's country of origin is not sufficient in itself to conclude that an individual runs a personal risk of

[11] See communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

[12] See, for example, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

[13] See CAT/C/LKA/CO/5, paras. 9-12.

[14] Freedom from Torture, *Tainted Peace: Torture in Sri Lanka since May 2009*, August 2015, available at www.freedomfromtorture.org/sites/default/files/documents/sl_report_a4_-_final-f-b-web.pdf; and Yasmin Sooka, The Bar Human Rights Committee of England and Wales (BHRC) and The International Truth and Justice Project, Sri Lanka, *An Unfinished War: Torture and Sexual Violence in Sri Lanka 2009-2014*, March 2014, available at www.barhumanrights.org.uk/wp-content/uploads/2014/03/an_unfinihsed_war_torture_and_sexual_violence_in_sri_lanka_2009-2014_0-compressed.pdf.

[15] See communication No. 628/2014, *J.N. v. Denmark*, decision adopted on 13 May 2016, para. 7.9.

torture.[16] The Committee also recalls that, although past events may be of relevance, the principle question before the Committee is whether the complainant currently runs a risk of torture if returned to Sri Lanka.[17] In the present case, although found generally credible about past events, the complainant has not demonstrated a foreseeable, real and personal risk of being subjected to torture if returned to Sri Lanka. The Committee notes that, in its assessment of the complainant's asylum application, the authorities of the State party also considered the possible risk of ill-treatment of failed asylum seekers upon return to Sri Lanka and is of the view that, in the present case, the State party's authorities gave appropriate consideration to the complainant's claim.

9.7 In the light of the foregoing and on the basis of all the information submitted by the complainant and the State party, including on the general situation of human rights in Sri Lanka, the Committee considers that the complainant has not discharged the burden of proof[18] as he has not adequately demonstrated the existence of substantial grounds for believing that his forcible removal to his country of origin would expose him to a foreseeable, real and personal risk of torture within the meaning of article 3 of the Convention. Although the complainant disagrees with the assessment of his claims by the authorities of the State party, he has failed to demonstrate that the decision to refuse him a protection visa was clearly arbitrary or amounted to a denial of justice.

10. Consequently, the Committee, acting under article 22 (7) of the Convention, decides that the complainant's removal to Sri Lanka by the State party would not constitute a breach of article 3 of the Convention.

---

[16] See, for example, communication No. 426/2010, *R.D. v. Switzerland*, decision adopted on 8 November 2013, para. 9.2.

[17] See, for example, communications No. 61/1996, *X.Y. and Z v. Sweden*, decision adopted on 6 May 1998, para. 11.2; No. 435/2010, *G.B.M. v. Sweden*, decision adopted on 14 November 2012, para. 7.7; and No. 458/2011, *X. v. Denmark*, decision adopted on 28 November 2014, para. 9.5.

[18] See communication No. 429/2010, *Sivagnanaratnam v. Denmark*, decision adopted on 11 November 2013, paras. 10.5-10.6.